SUPREME COURT, U. S.

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No. 176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JENKINS BROS., *Petitioner*

v.

LOCAL 5623, UNITED STEELWORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT

The Company (petitioner) and the Union (respondent) are parties to a collective bargaining agreement which provides that the Company may discharge employees only for just cause, and that the Union may arbitrate claims that the Company has violated the agreement.

The Company discharged an employee, Edward Saladak, on the stated ground that he had gambled on Company premises. The Union invoked arbitration of the question: "Was the discharge of Edward Saladak for just cause; if not, what shall the remedy be?" The Company instituted the present action in state court to restrain the Union and

The Connecticut State Board of Mediation and Arbitration (the arbitrator designated in the agreement) from arbitrating the dispute. The complaint acknowledged that the dispute was arbitrable under the agreement (R. 3a),[1] but asserted that the agreement was "unenforceable" (R. 6a) because:

> "An arbitration award directing the reinstatement of an employee discharged by an employer for violation on Company premises of the state gambling statutes is void and unenforceable as against the public policy of the State of Connecticut." (R. 5a).

The Union removed the action to federal district court on the ground that the complaint was one arising under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185 (R. 1a). The Union thereafter moved to dismiss the complaint for failure to state a claim (R. 13a).

The district court dismissed the complaint. It held that the dispute was arbitrable under the agreement, and that, "assuming without holding" that an award reinstating an employee for gambling on Company premises would violate Connecticut's public policy, "such state public policy is not controlling over, but must yield to, the substantive principles of national labor law" requiring arbitration of grievance disputes where the parties have agreed thereto (R. 17a-18a).

The Court of Appeals for the Second Circuit affirmed, in a *per curiam* opinion, on the authority of its decision in *Local 453, International Union of Electrical Workers* v. *Otis Elevator Company*, 314 F. 2d 25 (1963).

The Court of Appeals' judgment was entered on February 26, 1965. The Company did not move to stay the mandate, and the mandate issued on March 23, 1965.

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[1] Record references are to the Appendix to Appellant's brief in the court below, which constituted the record in the court below.

The State Board of Arbitration scheduled the arbitration to be heard on April 9, 1965. The Company's attorney appeared at the outset of the hearing to urge that the case not be heard, because "an arbitration hearing would make its case moot before the Supreme Court" (Appendix, p. 3).[2] The State Board decided to proceed, and the Company attorney refused to participate and left. The Board conducted the hearing in the absence of the Company attorney because, as the Company recognized in its complaint, "If one of the parties to a dispute fails to appear before said Board, after due notice, the Board may execute its duties *ex parte*" (R. 4a).

On June 7, 1965 the Company applied to the Court of Appeals "for recall of mandate and stay of its reissuance," stating that the State Board's award might be forthcoming at any time unless the mandate were recalled. On June 16, 1965 the Court of Appeals denied the Company's application.

On June 30, 1965, the State Board issued its arbitration award, reinstating Saladak, but without back pay for the 21 months during which he was denied employment. The award is set out in an appendix to this brief. The Board recited Saladak's testimony that he had had an excellent work record with the Company for 11 years; that "he had not taken 'play' in the plant but had carried slips into the plant representing 'play' taken at other times"; and that "he had not been involved in any kind of 'action' in the plant" (Appendix, p. 4). The Board found that to be arrested on Company property while in possession of policy slips, without having gambled on Company property, was not just cause for discharge, but warranted the imposition of the lesser discipline of denial of back pay.

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[2] "Appendix" refers to the appendix to this brief, consisting of the State Board's decision.

ARGUMENT

The petition for certiorari should be denied for several reasons:

(1) This action is now moot;

(2) The Company's "Question Presented" is *not* presented by the facts of this case; and

(3) The Company's "Question Presented" is not worthy of this Court's attention.

1. This action is now moot. It was brought to restrain the Union from "proceeding to arbitrate its dispute regarding the discharge of Edward Saladak" (R. 8a-9a). But the dispute has now been arbitrated, and the arbitration award rendered. There is nothing left to litigate.

2. The "Question Presented" is *not* presented by the facts of this case. According to the petition the "announced public policy" of the State of Connecticut precludes enforcement of an arbitration award reinstating an employee who has gambled *on Company premises*[3] (Petition for Certiorari, pp. 6, 8, 9, 11-12). The "Question Presented" (Petition, p. 2) is whether, in light of that "public policy," a federal court may order arbitration of the justness of discharge of an employee who gambled *"in the plant."* But this begs one of the questions which the Union wished to arbitrate: did Saladak gamble in the plant? Indeed, Saladak testified in the arbitration hearing that he did not, and the State Board of Arbitration concluded that "on the basis of the evidence presented in the hearing . . . there was not just cause for

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[3] The "announced public policy" on which the Company so heavily relies is an unappealed decision of a lower court. *Avco Corp.* v. *Preteska,* 22 Conn. Supp. 475, 174 A. 2d 684 (Super. Ct. Fairfield Co. 1961). The judge refused to enforce an award in which the arbitrator found that the employee *had* gambled on Company property but nonetheless ordered him reinstated. The language of the judge's opinion makes clear that the invoked "public policy" is applicable only if the arbitrator finds that the employee has gambled on Company property.

discharge" (Appendix, p. 5). An arbitration award reinstating Saladak because he did *not* gamble on Company premises does not conflict with any announced public policy of the State of Connecticut.[4] The decision of the court below, therefore, does not raise petitioner's "Question," for it does not "overrule the announced public policy of [the] state" (Petition, p. 2).

3. We have shown that petitioner's "Question" is not raised by the facts of this case. Even if it were, however, the "Question" would not be worthy of this Court's attention.

There is only one reported decision in which the "Question" has been considered, *Local 453, International Union of Electrical Workers* v. *Otis Elevator Co.*, 314 F. 2d 25 (2d Cir. 1963), *cert. denied* 373 U. S. 949 (1963). There, the arbitrator found that the employee *had* gambled on Company property but reduced the penalty from discharge to a seven-month suspension, reasoning "that Calise had already been punished once for his offense by the public authorities, that he had undergone a seven-month layoff without pay or unemployment compensation, that he had 24 years of unbroken seniority and satisfactory service at the Company, that he had 'heavy family obligations involving four young innocent children and a wife,' that as a result of discharge he would lose considerable pension rights 'built up after decades of service,' and that the company had not disciplined the four other men who 'were guilty also of violating the same rule against gambling in the plant.'" 314 F. 2d at 27.

The district court in *Otis* refused to enforce the award, on the ground that reinstatement of the employee would violate the "public policy" of the State of New York. 206 F. Supp. 853 (S. D. N. Y. 1962). The court of appeals re-

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[4] Moreover, arbitrators normally hold that gambling *outside* Company property does not constitute just cause for discharge. *Radio Corporation of America*, 39 L. A. 621 (1962); *General Electric Co.*, 41 L. A. 823 (1963).

versed. At the outset, it noted that the parties had bargained to have an arbitrator, not a court, decide whether the employee should be reinsated. 314 F. 2d at 28. Acknowledging that there might conceivably be some circumstances in which "public policy" would preclude enforcement of an arbitration award, it emphasized that this would be a *federal* "public policy," drawn from "the substantive principles of federal labor law which federal courts, under the mandate of Textile Workers Union of America v. Lincoln Mills, 353 U. S. 448 (1956), are empowered, to fashion." 314 F. 2d at 29. It determined that there is no federal policy precluding enforcement of an award reinstating an employee convicted of gambling on his employer's premises.

> "Of course there is a public policy which condemns gambling by an employee on the premises of his employer; it is a policy expressed by the section of the New York Penal Law which Calise was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated, by a criminal conviction and a judicial imposition of a penalty. . . . *There is no federal policy that requires greater vindication of the public condemnation of gambling than this.* The law is not that Draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation of Calise's offense." (314 F. 2d at 29; emphasis supplied.)

The Company in *Otis* had argued—as did the Company here—that it would be subjected to criminal liability if forced to reinstate the employee, because state law forbids an owner of premises from "knowingly" permitting gambling on the premises. The court dismissed the contention out of hand:

> "It is hard to imagine that an employer who had specifically indicated his disapproval of gambling on

the premises, had penalized the employee found guilty, and had warned against any such conduct in the future could be found guilty of violating the statute." 314 F. 2d at 29.

The Company petitioned for certiorari from the Second Circuit's decision. Certiorari was denied. 373 U. S. 949 (1963).

The decision in *Otis* clearly is correct, and effectuates federal labor policy. There have been no subsequent decisions by any court, state or federal, on the question decided in *Otis*. The question was not worthy of review in 1963, as this Court concluded in *Otis*, and it is no worthier of review today.

4. The decision below (or, more precisely, the decision of the court below in *Otis*, which the Company treats as if it were the decision below) does not conflict, even "in principle", with the cases relied upon in the petition (pp. 7-8). None of those cases arose under Section 301 of the LMRA, and thus none involved the enforceability of arbitration awards under the "federal common law" of *Lincoln Mills* and subsequent decisions. Moreover, none of those cases involved employees whose vice was gambling. The court below recognized, in *Otis*, that there might be some awards which would be unenforceable because in conflict with federally fashioned "public policy" 314 F. 2d at 29. It held only that there is no such policy precluding enforcement of an award reinstating an employee guilty of in-plant gambling. The Company's cases dealt with entirely different types of employee misconduct[5] and thus are totally inapposite.

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[5] Mutiny aboard ship *(Southern Steamship)*; seizure of the employer's plant *(Fansteel)*; membership and participation in the Communist Party *(Cutter Laboratory)*; refusal to transmit telegraph messages *(Western Union)*.

CONCLUSION

This case is moot. The "Question Presented" is *not* presented by the facts of this case. If it were, it would not be worthy of this Court's attention. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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STATE OF CONNECTICUT
LABOR DEPARTMENT

STATE BOARD OF MEDIATION AND ARBITRATION

JENKINS BROTHERS — and — LOCAL 5623 UNITED STEELWORKERS OF AMERICA	*Arbitration Award* Case No. 6364-A55 Dated: June 30, 1965

An arbitration hearing was held on this matter in Bridgeport, Connecticut, on April 9, 1965. Representing the Company was Clifford R. Oviatt, Jr., Attorney, and appearing for the Union was Warren Pyle, Attorney.

SPECIAL BACKGROUND

A grievance was processed in August 1964 protesting the discharge of Edward Saladak and it came to the arbitration step. Arbitration was requested by the Union. At that point it was decided that arbitration would be held up until the Company processed its claim in court that this matter was not a proper subject of arbitration.

In December 1964 the United States District Court dismissed the Company action to enjoin the Board from arbitrating the grievance in dispute. The Company then appealed to the United States Court of Appeals. On February 26, 1965, the Court dismissed the Company action.

In March, 1965 the Board received the following communication:

"Board of Mediation and Arbitration
State Labor Department
200 Folly Brook Boulevard
Wethersfield, Connecticut

"Attention: Robert A. Cronin
Board Secretary

Re: Jenkins Bros. and Local 5623, United Steelworkers of America

Board Case No. 6364 A-55

"Gentlemen:

"In your letter of March 22, 1965, you asked our advice as to whether the Board should assign the arbitration hearing in view of the decision in the above case of the United States Court of Appeals for the Second Circuit, Docket No. 29027, dismissing the employer's appeal.

"It is our opinion that the Board should now assign the matter for arbitration hearing as requested by the Union. Furthermore, we feel that the same procedures should be followed in the companion case—Jenkins Brothers and Local 123, O.E.I.U., Board Case No. 6364-A47.

"The ruling does in our opinion also govern the case involving Local 123, O.E.I.U.

"Very truly yours,

Harold M. Mulvey
Attorney General

By Raymond J. Cannon (Signed)
Raymond J. Cannon
Assistant Attorney General

"RJC:D
cc: Robert L. Stutz
Board Chairman"

The Board then set an arbitration hearing for April 9, 1965, at Bridgeport, Connecticut. The Company and Union presented themselves. The Company declined to participate in an arbitration hearing, claiming that it was planning an appeal to the United States Supreme Court and asked that arbitration not go forward until the Company's legal remedies were exhausted. The Company stated that an arbitration hearing would make its case moot before the Supreme Court. The Company also stated that the Attorney General of Connecticut had agreed that arbitration would not take place until litigation was completed.

The Board then caucused and decided that it would proceed immediately with an arbitration hearing. The Company declined to participate. As the Company left the hearing room, it instructed two police officers subpoenaed by it to stay at the hearing.

The Board then proceeded with an ex parte hearing and the Union requested that there be a decision in favor of the Union on the basis of a default by the Company.

The Board stated that the Union should put on its entire argument and the hearing continued.

Issue

The Board has set down the following issue for arbitration:

> Was the discharge of Edward Saladak for just cause? If not, what should the remedy be?

It is based upon the Union grievance as presented to the Company.

PERTINENT CONTRACT PROVISIONS

Article II, Management

A. Subject to the conditions of this agreement, the Union recognizes the retention by the Company of the usual management rights, including the management

of the work and the direction of the work force, the right to hire, suspend or discharge for just cause or to transfer; the right to relieve employees because of lack of work or for other legitimate reasons, and the right to determine the extent to which the plant shall be operated, including the determination of shift hours and the right to change methods or processes or to use new equipment.

Facts

On October 7, 1963, under sections of the Connecticut General Statutes, a number of policemen arrested Mr. Edward Saladak in the plant. The Company discharged Mr. Saladak.

On October 17, 1963, Mr. Saladak appeared with counsel before the Second Circuit Court (Bridgeport, Connecticut) and pleaded guilty to a charge of violation of Section 53-298 of the General Statutes entitled Policy Playing and Section 53-295 entitled Pool Selling. The record before the Court was introduced in evidence by the Union. It was testified that this was a first offense. The Court accepted the plea and fined Mr. Saladak $50.00 for policy playing and $100.00 for pool selling.

Argument

Mr. Saladak appeared as a Union witness and testified that he had worked for the Company for twelve years. His work record was excellent, he reported, with one warning in 1953 for taking an unauthorized day off.

In answer to a question from the Board, Mr. Saladak testified that he had not taken "play" in the plant but had carried slips into the plant representing "play" taken at other times. He stated further that he had not been involved in any kind of "action" in the plant.

The Union argued that Mr. Saladak has been punished by the Court and that the Company's discharge action was unjustified under all the circumstances.

The Union contended that the Avco case (Avco Corporation vs. Preteska, 174 Atlantic 2nd 684, 1961) did not apply since that case was involved with gambling activity on the Company premises during working hours. The Union pointed out that the Avco case had been rejected by the two Federal courts that heard the Saladak case.

Discussion

The Board noted the position of the Company with respect to its intended appeal to the Supreme Court and decided to go forward on the basis of the statement of the Attorney General (supra).

The Board noted the Union's position that there had been a default by the Company but decided that the Union must go forward and put on its total case for a decision by the Board.

The Board asked the two witnesses subpoenaed by the Company if they had statements to make. They did not offer a statement.

The initial question to be answered is as follows:

> Was there just cause for discharge in the arrest on the Company premises for violation of the law against policy playing and pool selling?

On the basis of the evidence presented in the hearing, the Board finds that there was not just cause for discharge.

This answer leads to the following question:

> It being determined that there was not just cause for discharge of Mr. Saladak, should there be a total remedy in favor of Mr. Saladak on the basis of an arrest on Company premises for policy playing and pool selling?

The arrest on Company premises for an illegal act on the Company premises compels the Board not to provide a total remedy to Mr. Saladak.

AWARD

1. The discharge of Edward Saladak was not for just cause. The Board, therefore, orders the Company to reinstate Edward Saladak to his job on the Monday following receipt of this award.

THE CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION

George Bennett (Signed)

George F. McDonough (Signed) (Dissenting)

Vincent J. Sirabella (Signed)

2. There will be no back pay awarded to Edward Saladak for the period from October 7, 1963 to the Monday following receipt by the Company of this award.

George Bennett (Signed)

George F. McDonough (Signed)

Vincent J. Sirabella (Signed) (Dissenting Opinion)

STATE OF CONNECTICUT
LABOR DEPARTMENT

STATE BOARD OF MEDIATION AND ARBITRATION

JENKINS BROTHERS — and — LOCAL 5623 UNITED STEELWORKERS OF AMERICA	*Dissenting Opinion* Case No. 6364-A55 Dated: June 30, 1965

I disagree with the Board's majority opinion, failing to award Edward Saladak back pay, for the following reasons:

1. The issue as framed was "Was the discharge of Edward Saladak for just cause?" Yet, in the discussion, this is translated into the following issue, "Was there just cause for discharge in the arrest on the Company premises for violation of the law against policy playing and pool selling?" I submit that this distorts the issue presented completely. It ignores entirely the fact that he was discharged for violation of the Company rule against wagering on the Company premises and that whether this rule was violated is the issue, not whether a state law or any other rule was violated. The facts failed to show any such violation. He was actually discharged on the basis of the arrest and not on the conviction.

2. The next issue as determined by the Board is "What shall the remedy be?" But again in the discussion it is translated to read "Should there be a total remedy in favor of Saladak on the basis of an arrest on Company premises for policy playing and pool selling?"

Since at the time of the discharge Saladak was only arrested for the violation of two statutes—and not for the specific crimes of policy playing or pool selling—the Company acted prematurely in rushing the discharge. It had not evidence of its own to indicate anything more than "possession" at that time. It had no evidence that there had been wagering by the employee on the Company premises. There was, therefore, no basis whatsoever for imposing any penalty then. It failed to offer any case here, and it, therefore, should be required to reinstate the employee with full rights of employment less any monies earned from employment since his discharge.

3. In this case, the matter was not heard for some *18 months* after the discharge. The entire delay was due solely to the employer's efforts in the Courts to *prevent arbitration.* The union made every effort to get a hearing, but the Board did not proceed until advised to do so by the Attorney General. The result of this delay—the employee lost an average of $130 per week or about $10,000, without regard to the Company insurance and pension plans and overtime. Hence, Saladak is being penalized to an extent that he is paying the legal costs involved in *preventing* arbitration. Moreover, while the Court's penalty for violation of the General Statutes was $150, the Board's denial of back pay in effect "fines" Saladak a sum many times greater than the Court did.

4. The Board's concern with the question of what an employer ought to do about an employee violating a state law on his premises was, in my opinion, answered by the Second Circuit Court in Otis Elevator vs. Local 453, IUE, where the Court pointed out that the individual has paid his debt to the community by way of a fine and that further punishment for such crime should not be imposed by the employer. The

answer is that this is society's obligation, not the individual employer's, and that once society has acted, the employer cannot superimpose an additional penalty for the violation of the law itself. This is particularly true here where the Company never had any evidence of "wagering on the Company premises."

Vincent J. Sirabella (Signed)